IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TIMEKA DESHIELDS DAVIS and RAYMOND DAVIS	:	CIVIL ACTION
v.	:	
UNITED STATES OF AMERICA	:	NO. 97-7122

M E M O R A N D U M

Ludwig, J. July 9, 1998

On June 30, 1998 the motion of defendant the United States of America to dismiss for lack of subject matter jurisdiction was granted. Fed. R. Civ. P. 12(b)(1).[1]

[1] "When subject matter jurisdiction is challenged under Rule 12(b)(1), the plaintiff must bear the burden of persuasion." Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir.), cert. denied, 501 U.S. 1222, 111 S. Ct. 2839, 115 L. Ed.2d 1007 (1991). Our Court of Appeals has stated:

> [W]hen there is a factual question about whether a court has jurisdiction, the trial court may examine facts outside the pleadings and thus the trial court may proceed as it never could under [Rule] 12(b)(6) or [Rule] 56. Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction — its very power to hear the case. . . . [N]o presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.

Robinson v. Dalton, 107 F.3d 1018, 1021 (3d Cir. 1997) (internal quotations and citations omitted).

Plaintiffs Timeka Deshields Davis and Raymond Davis brought this medical malpractice and loss of consortium action against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-80 (1994), for injuries resulting from a belated diagnosis of a tumor in Timeka Deshields Davis' spine. Compl., ¶ 14. Defendant moved to dismiss for lack of subject matter jurisdiction, Fed. R. Civ. P. 12(b)(1), on the ground that the treating doctors were independent contractors rather than employees of the government, 28 U.S.C. § 2671 (1994).[2] Defendant's motion, at 2. Plaintiffs' response conceded the doctors' independent contractor status but asserted that the United States should be estopped from raising the independent contractor defense because of inordinate delay. Plaintiffs' response, at 5. Jurisdiction is federal question and exclusive, 28 U.S.C. §§ 1331, 1346 (1994).

The factual record is as follows: In August and September 1993, Timeka Deshields Davis, complaining of back pain and

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[2] The FTCA's limited waiver of the federal government's sovereign immunity

> vests exclusive jurisdiction in district courts for claims against the United States "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act occurred."

Norman v. United States, 111 F.3d 356, 356 (3d Cir. 1997) (quoting 28 U.S.C. § 1346(b) (1994)). "Title 28 U.S.C. § 2671 explains that 'Federal agency' and 'Employee of the government' do not include any contractor with the United States." Id.

numbness, was examined by Dr. Alan Soltys and Dr. Carolyn Cavuto-Carnivale at the Primary Care Clinic of the Philadelphia Naval Hospital. Compl. ¶ 6. On September 8, 1993 Dr. Soltys referred her to an orthopedic physician at the Hospital of the University of Pennsylvania. ¶ 7. After examining Davis, that physician wrote to Dr. Soltys advising that an MRI be conducted. ¶¶ 8-9. On September 24, 1993 Dr. Soltys again examined her but did not order an MRI. ¶¶ 10-12. Despite her continuing complaints of back pain and numbness, no MRI was ordered for almost five months. ¶ 13. On March 24, 1994 MRI results indicated the presence of a spinal tumor. ¶ 14. On March 30, 1994 Davis was admitted on an emergency basis to Pennsylvania Hospital, where she underwent a total laminectomy of T12-L4 as well as a subtotal resection of the tumor. ¶ 15. She was rendered paraplegic and hemiplegic with bowel and bladder dysfunction and multiple complications. Plaintiffs' response, at 2.

On November 23, 1994 plaintiffs' then attorney Edward L. Wolf wrote to the commanding officer of the Philadelphia Naval Medical Clinic advising of Davis' treatment by Dr. Soltys and requesting forms necessary to file administrative claims under the FTCA.[3] Id. exh. c. On November 28, 1994 the Tort Claims Section of the Naval Legal Service Office Northeast, in Groton, Connecti-

[3] Under the FTCA's administrative exhaustion requirement, a claim must first be presented to the "appropriate Federal agency." 28 U.S.C. § 2675(a) (1994). After a final written denial of the claim — or six months without a final disposition — a claimant may file suit in federal court. Id.

cut, sent Wolf copies of the standard claim form. Id. exh. d. In January 1995, Lt. Commdr. Barton A. Branscum, a physician and the assigned naval medical investigator, met with Wolf to discuss the factual basis of plaintiffs' claims. Id. exh. e, decl. of Edward L. Wolf, ¶ 6. At the meeting, Branscum did not advise Wolf about Dr. Soltys' independent contractor status. Id. On February 2, 1995 Wolf wrote to Branscum asking that he confirm his receipt of Davis' medical records. Id. exh. f. On March 2, 1995 Branscum notified Wolf by letter that he had completed his investigation. Id. exh. g. No mention was made of the employment status of the doctors. Id. exh. e, ¶ 8.

On March 17, 1995 the Naval Legal Service Office in Connecticut requested a copy of Lt. Commdr. Branscum's investigation from the Philadelphia Naval Medical Clinic. Defendant's reply, exh. 3, aff. of Lt. David Eric Dow, ¶ 8. On July 17, 1995 Wolf submitted the standard claim forms for plaintiffs to the Naval Legal Service Office Northeast, in Connecticut. Plaintiffs' response, exh. h. On July 26, 1995 the forms were returned for lack of signatures and date, id. exh. i, and on July 28, 1995 the forms were re-submitted, id. exh. j. As of November 4, 1995 a copy of Branscum's investigation had not yet been received by the Naval Legal Service Office. Defendant's reply, exh. 3, ¶ 12.

In March 1996, the statute of limitations expired for any medical malpractice claims plaintiffs could have brought under

Pennsylvania law.[4] 42 Pa. C.S.A. § 5524(2), (7) (1997). On May 14, 1997 the Tort Claims Branch of the Navy's Judge Advocate General's office in Alexandria, Virginia notified plaintiffs for the first time that Drs. Soltys and Cavuto-Carnivale were independent contractors. Plaintiffs' response, exh. k. On September 15, 1997 their claims were formally denied on that ground. Id. exh. l. On November 11, 1997 plaintiffs timely filed suit.[5]

Although conceding the independent contractor status of the treating physicians, plaintiff's response argues that the two-and-a-half year delay[6] in raising the independent contractor defense estops the government from doing so now. However,

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[4] It is assumed that plaintiffs' claims accrued either on March 24 — the date of the MRI — or on March 30, 1994 — the date of surgery.

[5] Plaintiffs' action was timely under the FTCA because the claims were presented to the appropriate federal agency within two years of accrual, and because suit was filed within six months of the mailing of the final administrative denial of the claims. See 28 U.S.C. § 2401(b) (1994).

[6] The government's reply states that the delay was the result of the 1993-1994 downsizing and consolidation of Naval Legal Service Offices in the eastern United States, including the closure of the Philadelphia office. Defendant's reply, exh. 1, decl. of Capt. Mark M. Horgan, ¶¶ 4-5, 7. According to the reply: (1) at the time of Lt. Commdr. Branscum's investigation of Davis' claim, there were no claims attorneys assigned to the Philadelphia Naval Medical Clinic, id. ¶ 9; (2) the investigation was medical — to determine whether the applicable standard of care had been met — rather than legal, id. at 10; exh. 1, ¶ 9; and (3) a copy of the investigation report should have been forwarded sooner to the Naval Legal Service Office in Connecticut for legal analysis of the claims, id. at 10; exh. 1, ¶ 10. It is not clear whether Lt. Commdr. Branscum ever prepared a report. Id. at 10-11.

"equitable estoppel[7] will not lie against the Government in the same fashion as it does against private litigants." Office of Personnel Management v. Richmond, 496 U.S. 414, 419, 110 S. Ct. 2465, 2469, 110 L. Ed.2d 387 (1990). The Court has instructed:

> Our own opinions have continued to mention the possibility, in the course of rejecting estoppel arguments, that some type of "affirmative misconduct" might give rise to estoppel against the Government. . . . Courts of Appeals have taken our statements as an invitation to search for an appropriate case in which to apply estoppel against the Government, yet we have reversed every finding of estoppel that we have reviewed. Indeed, no less than three of our most recent decisions in this area have been summary reversals of decisions upholding estoppel claims.

Id. at 422, 110 S. Ct. at 2470 (citing INS v. Hibi, 414 U.S. 5, 8, 94 S. Ct. 19, 21, 38 L. Ed.2d 7 (1973) (per curiam), Schweiker v. Hansen, 450 U.S. 785, 788, 101 S. Ct. 1468, 1470, 67 L. Ed.2d 685 (1981) (per curiam), and INS v. Miranda, 459 U.S. 14, 19, 103 S. Ct. 281, 283, 74 L. Ed.2d 12 (1982) (per curiam)); see also id. at 423, 110 S. Ct. at 2471 ("We leave for another day whether an estoppel claim could ever succeed against the Government.").

As a result, in addition to the traditional elements of estoppel, the Courts of Appeals now require some type of affirmative misconduct on the Government's part. See, e.g.,

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[7] The traditional elements of equitable estoppel are: the party to be estopped must (1) have known the facts; and (2) intend that his or her conduct will be acted upon or must so act that the party asserting the estoppel has the right to believe it was so intended. The party asserting estoppel must (3) be ignorant of the true facts; and (4) rely on the other party's conduct to his or her injury. See IRS v. Kaplan, 104 F.3d 589, 601 n.27 (3d Cir. 1997).

Linkous v. United States, C.A. No. 97-50566, 1998 WL 260986, at *6 (5th Cir. June 9, 1998); Fredericks v. Commissioner of Internal Revenue, 126 F.3d 433, 435 (3d Cir. 1997); Carrillo v. United States, 5 F.3d 1302, 1306 (9th Cir. 1993). "To qualify as affirmative misconduct, a party must allege more than mere negligence, delay, inaction, or failure to follow an internal agency guideline." REW Enterprises, Inc. v. Premier Bank, N.A., 49 F.3d 163, 169 (5th 1995) (internal quotations and citations omitted). Such misconduct necessitates "an affirmative misrepresentation or affirmative concealment of a material fact by the government." Linkous, 1998 WL 260986, at * 6; see also Fredericks, 126 F.3d at 438 ("[S]ome forms of erroneous advice are so closely connected to the basic fairness of the administrative decision making process that the government may be estopped from disavowing the misstatement") (quoting Community Health Servs. of Crawford County v. Califano, 698 F.2d 615, 622 (3d Cir. 1983), rev'd on other grounds sub nom. Heckler v. Community Health Servs. of Crawford County, 467 U.S. 51, 104 S. Ct. 2218, 81 L. Ed.2d 42 (1984)).

Here, however, no affirmative misrepresentation, concealment, or even misstatement by the government has been asserted by plaintiffs. The gist of their response is that the government negligently failed to disclose the independent contractor defense before the statute of limitations had run on potential state law claims against Drs. Soltys and Cavuto-Carnivale. See, e.g., plaintiffs' response, exh. e, Wolf decl. ¶ 6

("Lt. Commander Branscum at no time advised me during our meeting that Dr. Soltys or the physicians working in the Primary Care Clinic were independent contractors."). There is no suggestion that Branscum was aware of the employment status of the doctors or that he intentionally hid that information from plaintiffs. Instead, the record reflects a lack of communication between the naval investigative and legal offices in Philadelphia and Connecticut — 22 months passed from the filing of plaintiffs' administrative claim before the government gave notice of its intention to rely on the independent contractor defense. The government's belated disclosure, while perhaps unjustifiable and inequitable, does not qualify in law as affirmative misconduct.

Lurch v. United States, 719 F.2d 333 (10th Cir. 1983), cert. denied, 466 U.S. 927, 104 S. Ct. 1710, 80 L. Ed.2d 182 (1984), is not helpful. Lurch dictum is to the effect that unreasonable delay in invoking the independent contractor defense can amount to affirmative misconduct. Id. at 341. Lurch noted, however, that plaintiff had also delayed in bringing suit after the expiration of the six-month administrative claim period, 28 U.S.C. § 2675(a) (1994). Id. at 341 n.13 ("After six months if the claim is not settled a claimant has the option of deeming it a final disposition."). Here, plaintiffs requested claim forms from the government eight months after Timeka Deshields Davis' surgery and did not properly submit them for another eight months. Plaintiffs'

response, at 2, 4.[8] Further, the six-month window of § 2675(a) ended in January 1996, two months before the state statute of limitations expired. The government did not delay in answering the complaint. "If the plaintiff[s] had brought suit earlier, [they] would have known of the Government's independent contractor defense in time to bring a state action." Lurch, 719 F.2d at 341; see also Zeleznik v. United States, 770 F.2d 20, 23 (3d Cir. 1985), cert. denied, 475 U.S. 1108, 106 S. Ct. 1513, 89 L. Ed.2d 913 (1986) ("Once the injured party is put on notice [of the invasion of his legal rights], the burden is on him to determine within the limitations period whether any party may be liable to him"); Davis v. United States, 642 F.2d 328, 331 (9th Cir. 1981), cert. denied, 455 U.S. 919, 102 S. Ct. 1273, 71 L. Ed.2d 459 (1982) ("In the absence of fraudulent concealment it is plaintiff's burden, within the statutory period, to determine whether and whom to sue.").[9]

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[8] According to the record, plaintiffs made only one inquiry as to the status of their claims after filing them on July 28, 1995, and it is not clear that this request occurred prior to the expiration of the state statute of limitations. Id. exh. k, May 14, 1997 letter from defendant's tort claims branch to Mitchell Shore, Esq. (responding to his "request for information pertaining to the physician who provided treatment to your client"; no date for the request is given).

[9] Plaintiffs also rely on (1) Home Savings and Loan Assn. of Lawton, Oklahoma v. Nimmo, 695 F.2d 1251 (10th Cir. 1982), vacated sub nom. Walters v. Home Savings and Loan Assn. of Lawton, Oklahoma, 476 U.S. 1223, 104 S. Ct. 2673, 81 L. Ed.2d 870 (1984); (2) Utterback v. United States, 668 F. Supp. 602 (W.D. Ky. 1987); and (3) Gamble v. United States, 648 F. Supp. 438 (N.D. Ohio 1986). In Home Savings there was a finding of affirmative concealment by the government, see 695 F.2d at 1255, rather than negligence. The Supreme Court, however, vacated the judgment for further consideration in light of Heckler v.

(continued...)

Accordingly, the action had to be dismissed for lack of subject matter jurisdiction.

Edmund V. Ludwig, J.

[9](...continued)
Community Health Services of Crawford County, 467 U.S. 51, 104 S. Ct. 2218, 81 L. Ed.2d 42 (1984), and, on remand, judgment was entered for the government, see 742 F.2d 585, 585 (10th Cir. 1984).

Utterback and Gamble held that the government was estopped from utilizing the independent contractor defense because the government hospitals involved held themselves out to be full-service institutions. See 668 F. Supp. at 607; 648 F. Supp. at 441-42. These decisions, however, have been criticized for confusing "affirmative action with affirmative misconduct." Linkous, 1998 WL 260986, at *6 n.3 (quoting Carrillo v. United States, 5 F.3d 1302, 1306 (9th Cir. 1993)).